Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1994

STEPHEN A. HUNTER, Petitioner

v.

NORTHROP UNIVERSITY SCHOOL OF LAW Respondent

On Petition For Writ of Certiorari To The Court of Appeal, 2nd Appellate District of California and The Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

May a court which is the only court that has subject matter jurisdiction of the issues in a lawsuit, decline to hear the case and does that violate Due Process and Equal Protection pursuant to the Fourteenth Amendment?

May a court which does not have subject matter jurisdiction not transfer a case to a court that does when a motion is made to do so, pursuant to the laws of that state?

May courts not follow their own laws, and does that failure to follow their own law violate Due Process and Equal Protection pursuant to the Fourteenth Amendment?

May this Court issue mandamus to a state court to compel them to hear and decide a matter for which they have sole original subject matter jurisdiction and does the denial of a hearing in that proper forum violate Due Process and Equal Protection under the Fourteenth Amendment?

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

STEPHEN A. HUNTER, Petitioner

vs.

NORTHROP UNIVERSITY, Respondent
SCHOOL OF LAW

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND THE COURT OF OF APPEAL OF CALIFORNIA, 2ND DISTRICT

Petitioner, Stephen A. Hunter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal 2nd Appellate District of California, and the refusal of the California Supreme Court to take jurisdiction of the

case from the Court of Appeal, thereby preventing Petitioner from being able to have his case heard in the only forum that has subject matter jurisdiction under California law, in violation of his right to Due Process and Equal Protection under the Fourteenth Amendment to the U.S. Constitution.

OPINIONS BELOW

The non-published opinion of the Court of Appeal is set forth in Appendix A to this Petition. The order denying Petitioner's petition for rehearing in the Court of Appeal appears by declaration in Appendix B to this Petition. The order of the California Supreme Court denying Petitioner's petition for review appears in Appendix C to this Petition.

JURISDICTION

The Court of Appeal's opinion in this matter was filed on Jan. 25, 1994. A timely petition for rehearing was filed Feb. 8,1994. The Court of Appeal's denial of the petition

of the petition for rehearing was issued on Feb. 15, 1994 and is set forth by declaration in Appendix B. A timely Petition for Review in the Supreme Court of California was filed on March 7, 1994. The order denying review was filed April 12, 1994 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. sec. 1254 (a).

On July 23, 1994, Petitioner recieved notice from the Clerk of the Supreme Court, pursuant to Rule 33.7, that he should redo his otherwise timely filed Petition to be in compliance with Rule 33, which he has.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1. of the Fourteenth Amendment to the Constitution reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

and of the State where they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without d process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Court recognizes the practice of law as a valuable property interest which cannot be denied in a manner or for reasons that contravene Due Process or Equal Protection pursuant to the Fourteenth Amendment. Under California law, the Supreme Court of California has "sole original jurisdiction of the attorney admission process."

Petitioner argued before the Court of Appeal that neither they, nor the Superior Court from which the appeal had been taken, had subject matter jurisdiction of the issues in this case, under California law, because

like the other action raised as res judicata to this action, the basis for sustaining the demurrer without leave to amend, it involved a determination as to whether Petitioner was eligible to take a bar exam, an essential element of the attorney admission process.[1]

He cited several cases in support of his contention and moved to transfer the case to its proper forum, the California Supreme Court He further moved that the other action relied upon as res judicata be vacated as lacking in subject matter jurisdiction, and pointed out to the Court of Appeal that under California law, a judgment lacking in subject matter jurisdiction, may be attacked at any time, and is not subject to waiver, estoppel, or consent.

Respondent did not oppose the motion to transfer the case to the California Supreme Court, or the motion to vacate the other judgment which had been raised as res judicata, and offered no rebuttal whatsoever to Petitioner's contention that subject matter juris-

1 Discussed further at pages 16-20.

jurisdiction was lacking. The Court of Appeal asked no questions whatever, of Petitioner.

Petitioner further argued that Respondent's counsel had made a judicial admission,[2] which would cause him to be successful if he was able to be heard in the proper forum, the California Supreme Court. Respondent has never challenged this contention.

The Court of Appeal affirmed the dismissal on Jan. 25, 1994, which opinion is set forth in Appendix A. That opinion does not even mention Petitioner's argument that they did not have subject matter jurisdiction and does not acknowledge that Petitioner asked to have the case transfered to the proper forum, so that Petitioner's rights of due process, the opportunity to be heard in the proper forum, could be satisfied. It further calls the motion to vacate the other action, on the ground of lack of subject matter jurisdiction, simply a "motion to vacate", which it denied, with no reasoning offered. It does not address the issue of the Judicial Admission, either.

2 Under California law statements and conduct may constitute judicial admissions.

Petitioner filed a timely petition for rehearing in the Court of Appeal citing the above reasons for his contention that his right to procedural due process, and equal protection under the Fourteenth Amendment were violated. Respondent filed no opposition. The Court of Appeal denied the petition for rehearing Feb. 15, 1994, the order which is set forth by declaration as Appendix B.

Petitioner filed a timely petition for review in the Supreme Court of California, on March 7, 1994. He argued that there was no other forum that had subject matter jurisdiction of the issues in the case and to not hear the matter would deprive Petitioner of procedural due process and equal protection under the Fourteenth Amendment.

He further argued that the Court of Appeal and the Superior Court were refusing to follow the law, which was also a violation of Petitioner's right to procedural due process and equal protection under the Fourteenth Amendment, as did the willful failure of the

Court of Appeal to acknowledge in its opinion, the Uncontested Judicial Admission of the respondent which should have resulted in immediate judgment for Petitioner. The California Supreme Court denied his petition for review without comment on April 12, 1994, as set forth in Appendix C.

It is further submitted that the Court of Appeal violated Petitioner's right to procedural due process and equal protection under the Fourteenth Amendment because it is apparent from the opinion that they were knowingly using cases which did not apply to the facts of this case and ignored the correct case that Petitioner had argued which set forth in great detail the procedure to be employed, and the reasoning behind said procedure.

Furthermore, this example that Petitioner sets forth herein, is illustrative of the hurdles that have been placed before him, because the courts of California evidently do not like the idea that a law student would try to bring a dishonest law school to justice. In fact,

Northrop's law school was closed either by order of the State of California or the anticipation that it would be. In addition, it shows why the "frivolous" discussion in the opinion is included to provide a pretext, to prevent higher courts such as this Court, from giving a fair hearing on this matter.

On pages 8-10 of the opinion of the Court of Appeal, Appendix A, it states that they relied upon Fromhaggen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, and Eichman v. Fotomat Corp. (1983) 147 Cal App. 3d 1170. Neither case is applicable to the facts of this case.

The Fromhaggen case is very different from this case, because there was a TRIAL on the issues in the previous action raised as res judicata, as opposed to this case, where the matter was simply decided on the ground of demurrer sustained without leave to amend.

> "Following a two day trial, the superior court issued its statement..." 197 Cal. App. 3d. at 1297.

The Eichman case is also very differ-

ent from this case, because there was a SETTLMENT in the previous action raised as res judicata, the court stating the following:

> "The Eichman's final contention, the judgment in the first action is not res judicata because it followed a settlment rather than a trial is absurd." 147 Cal. App. 3d at 1177.

As was pointed out throughout the proceedings, in briefs, oral argument, petition for rehearing inthe Court of Appeal, and petition for review in the Supreme Court of California, and NEVER challenged by the Respondent, there had never been a trial, settlement, or summary judgment, in the action (WEC089355) raised by the Respondent and relied upon as res judicata therefore, Keidatz v. Albany (1952) 249 P. 2d 264, is the proper case to use for guidance.

In Keidatz, supra, the California Supreme Court spelled out very clearly how to proceed, when a judgment that was obtained after the sustaining of a demurrer without leave to amend, is raised by a defendant as a bar to a subsequent action. It states:

> "If on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint."
> 249 P 2d at 265.

The factual and procedural background set forth in the opinion of the Court of Appeal intentionally omits the fact that Petitioner had filed and served a proposed 2nd amended complaint along with his opposition to the SECOND demuurer to the same 1st amended complaint refered to. Petitioner pointed this out to the Court of Appeal in briefs, oral argument, and petition for rehearing in the Court of Appeal, and then to the California Supreme Court in his petition for review.

The Court of Appeal is duty bound to follow the procedure set forth by the Supreme Court of California in Keidatz, supra. In fact this same 2nd district Court of Appeal ruled in the similar case of Kanarek v. Bugliosi (1980) 166 Cal Rptr. 526., that:

> "Thus we are instructed by Keidatz that we must evaluate the second complaint to determine whether new or additional facts are alleged which the defects in the original pleading. If they are, the order of dismissal must be reversed."
> 166 Cal Rptr. at 531.

As Petitioner has stated to the courts of California, before coming to this Court, the Respondent never pointed out any specific deficiency in the proposed 2nd amended complaint as California law required them to do. At page 12 of the opinion of the Court of Appeal, it states, "the record leaves a modicum of doubt whether this appeal indisputably has no merit. The fact of the matter is that there is no record at all pointing out deficiency in the proposed 2nd amended complaint and therefore even if they had subject matter jurisdiction, they have violated Petitioner's right to procedural due process and equal protection under the Fourteenth Amendment, totally depriving him of his rightful opportunity to make his case under the established procedural law of California.

The reason Respondent never pointed out any deficiency in the proposed 2nd amended complaint is because there were none. In fact, the judicial admission which Petitioner reiterates again here, has its genesis in the judge of the superior court asking the Respondent's counsel, why Northrop could not have graduated Petitioner at any time (the basis for suit). This was in response to Petitioner having pointed out added allegations of the proposed 2nd amended complaint, in that open court.

Petitioner also pointed out to the Court of Appeal and the Supreme Court of California that Keidatz, supra also spoke on the inconvenience for the Respondent:

> "On the other hand less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial ...and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint is not materially greater."
> 249 P. 2d at 266.

It is submitted that when a law school does everything it can to deprive its own student of the benefit he has payed and worked for, it is not unreasonable for the student to try to bring them to justice. Once again, the Supreme Court of California is crystal clear in its defense of those who seek redress of grievance by following the procedure set forth in Keidatz, supra:

> "Since it is a settled rule of procedure upon which parties are entitled to rely in conducting their litigation, any change therin should be made by the legislature and not by this court."
> 249 P. 2d at 266.

Because the opinion of the Court of Appeal had no discussion of the statute of limitations, and Petitioner reminded them of that in his petition for rehearing in the Court of Appeal, Petitioner assumed that the Court of Appeal accepted his uncontested argument, supported by repeated reference to the record, that the superior court had not been correct in sustaining the demurrer on that ground, and therefore does not address that issue in this Petition.

REASONS FOR GRANTING THIS WRIT

Certiorari should be granted because the act of the Court of Appeal in assuming subject matter jurisdiction it does not have, and the failure of the California Supreme Court to take a case over which it has sole original jurisdiction, combined with those court's failure to follow their own rules, violates Petitioner's right to procedural due process and equal protection under the Fourteenth Amendment.

Furthermore, they are in violation of California Rule of Court 29 (a)(2) which states, "Review by the Supreme Court of a Court of Appeal decision will be ordered where the Court of Appeal was without jurisdiction of the cause.

This Court has held that Due Process is violated when a claimant is prevented from having the opportunity to present his claim in the proper forum. In Knox County v. Aspinwall, 16 L.Ed. 735 (1861), this Court stated:

> "But no court having proper jurisdiction and process to compel the satisfaction of its judgments can be justified in turning its suitors over to another tribunal to obtain justice."
> 16 L.Ed. at 738.

Under California law, the California Supreme Court has "sole original jurisdiction over the attorney admissions process." In Smith v. State Bar, 212 Cal. App. 3d 976, (1989), this same Court of Appeal[3] refused to hear a matter pertaining to a refund for a bar exam that was not taken, ruling that it should have been brought in the California Supreme Court:

> "The contention that Smith properly brought suit in the trial court rather than seeking relief in the Supreme Court also lacks merit. Smith concedes the Supreme Court has "sole original jurisdiction over the attorney admissions process."
> 212 Cal. App. 3d at 976.

One must ask, if even a fee refund for a bar exam is to be brought in the California Supreme Court, how can a determination of whether Petitioner is eligible to take the bar exam not be held to be in the California Supreme Court?

3 The Justice who wrote the opinion in this case was the Judge who handled Smith, supra when he was a trial judge.

This Court has held that a state or governmental body violates due process when it fails to follow its own rules. In Yellin v. U.S., 374 U.S. 109 (1963) this Court stated:

> "The committee prepared the groundwork in Yellin's case meticulously. It is not to exacting to require that the committee be equally meticulous in obeyimg its own rules."
> 374 U.S. at 124.

This Court has held that a court which does not have subject matter jurisdiction of the issues in a lawsuit, will in effect, issue a void judgment which may not be relied upon as res judicata in another matter and that such objection may be raised at any time In Grubb v. Public Utilities Comm., 281 U.S. 470 (1929), this Court stated:

> "But the appellant does question that it had jurisdiction of the subject matter and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction must arise by law and not by mere consent."
> 281 U.S. at 475.

On page 2 of the opinion of the Court of

Appeal, as set forth in Appendix A, it is clear that the Court of Appeal was dealing subject matter that they did not have jurisdiction of. In discussing the lawsuit they stated, "The gist of the lawsuit is appellant's claim that Northrop University School of Law prohibited him from completing his law school education in 1982, refused to represent to the Committee of Bar Examiners that Appellant was not on probation in 1982, and in other ways thwarted appellant from being able to take the California bar exam."

Pages 7-10 make it clear that the Court of Appeal is relying upon judgments which they do not have subject matter jurisdiction of as the basis for their claim of res judicata. It follows therefore that the only relevance of the opinion is that it shows that they do not have subject matter jurisdiction of the issues and is in effect, void.

Because neither the Court of Appeal, nor the Superior Court had subject matter jurisdiction of the issues in this case, no issue

has been determined and it follows that the matter should have been transfered to the California Supreme Court for adjudication in the proper forum of the issue as to whether Petitioner was eligible to take the bar exam.

This Court has held that the practice of law is avaluable property interest which cannot be denied in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. In Konisberg v. State Bar, 353 U.S. 252, this Court stated:

> "The Committee's action prevents him from earning a living practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."
> 353 U.S. at 257,258. (1957)

In Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, (1956) this Court stated:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."
> 353 U.S. at 238,239.

It is submitted that the refusal of the California Supreme Court to take jurisdiction of this case, when under California law, they have "sole original jurisdiction" of the subject matter, prevents Petitioner from having the opportunity to present his case in its proper and only forum, hence depriving Petitioner of his right to Due Process and Equal Protection under the Fourteenth Amendment.

This Court has held that it may issue a writ of mandamus to a state supreme court, to aid in its appellate or supervisory jurisdiction. In Dean v. Hickman, 358 U.S. 57, this Court stated:

> "The motion for leave to file a petition requesting this Court to mandamus the Texas Supreme Court to conform its decision to our mandate in that case is granted. Assuming as we do that the Supreme Court of Texas will of course conform to the disposition we now make, we do not issue the writ of mandamus." 358 U.S. at 57.

Petitioner therefore requests this Court to issue mandamus to the California Supreme Court to hear this case, setting a reasonable time for Petitioner to file an opening brief

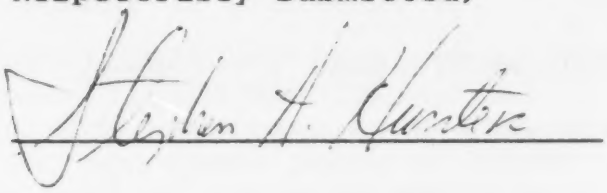
and at an appropriate time, have the opportunity to present oral argument.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeal and the refusal of the California Supreme Court to take jurisdiction of this matter.

DATED: July 29, 1994

Respectfully submitted,



NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CA.

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEPHEN A. HUNTER,

Plaintiff and Appellant

v.

NORTHROP UNIVERSITY SCHOOL OF LAW,

Defendant and Respondent.

No. B071292

(Sup. Ct. No. WEC 103209)

COURT OF APPEAL
Second Dist.
FILED JAN 25,1994

Joseph A. Lane
Clerk

APPEAL from a judgment of the Superior Court of L.A. County Irving Shimer, Judge.

Affirmed.

Stephen A. Hunter, in pro per., for Plaintiff and Appellant.

Gaims, Weil, West and Epstein, John Gaims and Peter L. Steinman for Defendant and Respondent.

APPENDIX A

The trial court sustained defendant respondent's demurrer to plaintiff-appellant's first amended complaint. A judgement of dismissal was entered and appellant filed the instant appeal.

The gist of the lawsuit is appellant's claim that Northrop University School of Law (respondent or Northrop) prohibited him from completing his law school education in 1982, refused to represent to the Committee of Bar Examiners (CBE) that appellant was not on probation in 1982, and in other ways thwarted appellant from being able to take the California bar exam.

In response to this claimed 1982 misconduct appellant filed three actions and nine complaints or amended complaints against respondent. The first action concluded with Division Four of this Court, affirming the judgement of dismissal, entered following the sustaining of a demurrer without leave to amend. (Stephen A. Hunter v. University of LaVerne et al. No. B02716, July 19, 1988

per Justice McCloskey.) The second action, a cross-complaint filed by appellant in connection with Northrop's eavesdropping complaint, also concluded with Division Four, of this Court, affirming the judgement of dismissal, entered following the sustaining of a demurrer without leave to amend. (Northrop University School of Law v. Stephen A. Hunter No. B044851, Aug. 29, 1991 per Justice Goertzen.)

In this, the third action, we affirm the judgement of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Justice McCloskey described the facts as follows:

"In 1978 plaintiff undertook the study of law at Pepperdine University School of Law (Pepperdine) which is accredited by the Committee of Bar Examiners (Committee). Plaintiff failed to satisfactorily complete his first year of studies as his grade point

average fell below 70 at the end of his first year of law study. Plaintiff petitioned Pepperdine to put him on probation and to allow him to continue his studies at that institution. Pepperdine denied plaintiff's petition and academically disqualified him.

"In 1980, plaintiff was admitted to study law at LaVerne which, too, was accredited by the Committee.

"In 1981, plaintiff was admitted to study law at Northrop which is accredited by the Committee.

"On May 15, 1982, Northrop refused to sign a form stating that plaintiff was a student in good standing. In September 1982 Northrop refused to allow plaintiff to register for classes.

"Plaintiff alleged that he was unable to take the California Bar Examination and that this inability was attributable to conduct by Pepperdine, LaVerne, and Northrop (Stephen A. Hunter v. University of LaVerne No. B02716, pp. 2-3.)

Appellant's first complaint, in his first action, against Northrop (and Pepperdine University, LaVerne University, and the Committee of Bar Examiners) was filed Sep. 4 1984 (WEC089355). It was followed by a first amended, second amended, and finally a third amended complaint. As to Northrop, this final pleading alleged causes of action for breach of contract, fraud-deceit-intentional misrepresentation, violation of civil rights and breach of fiduciary duty. On March 11, 1986, Superior Court Judge David Rothman sutained Northrop's demurrer, without leave to amend.

Appellant's second action was a cross-complaint filed April 22,1988.[1] It was succeeded by a first amended and second amended cross-complaint. This final pleading

1 Northrop had filed an unlawful recording complaint against appellant in municipal court. Appellant's cross-complaint, (bearing case number WEC089355, the number of his first action) was filed in superior court. The municipal court complaint was, thereafter, consolidated with appellant's cross-complaint.

also alleged causes of action for breach of contract, intentional misrepresentation and breach of fiduciary duty, as well as negligence, breach of covenant of good faith and fair dealing, and negligent infliction of emotional distress. On June 26, 1989, Superior Court Judge Jack M. Newman sustained Northrop's demurrer without leave to amend.

The instant action (WEC103209) commenced with appellant's complaint filed May15 1986. It was not served and was superceded by a first amended complaint (appellant's ninth pleading) filed July 15, 1986. This latter pleading again alleged, as to Northrop, causes of action for breach of contract, intentional misrepresentation, and breach of fiduciary duty. On Feb. 6, 1987, Superior Court Judge Irving Shimer sustained Northrop's demurrer but stayed further proceedings until appellant's appeal in case number WEC 089355 (the first action) was determined. Although that appeal was determined on July 19, 1988, the instant case remained dormant

until April 18, 1991, when the trial court on its own motion dismissed it. Appellant, on May 26, 1992, had the dismissal vacated and the matter reinstated. On June 24, 1992, Northrop again demurred, asserting the ground of res judicata. On July 20, 1992, Superior Court Judge Irving Shimer sustained the demurrer "on the grounds of res judicata and ... the statute of limitations." This appeal followed.

DISCUSSION

Res Judicata

"The doctrine of res judicata gives certain conclusive effect to a former judgement in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration. It is well established in common law and civil law jurisdictions, and is frequently declared by statute." (7 Witkin, Cal. Procedure (3d ed. 1985) Judgement,188,p.622.Original emphasis)

"In a new action on the same cause of action, a prior judgement for the defendant is a complete bar...." (Id., 188, p.622. Original emphasis.)

"In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state. The doctrine of res judicata has a double aspect, First, it precludes parties or their privies from relitigating the same cause of action that has been finally determined by a court of competent jurisdiction. Second, although a second suit between the same parties on a different cause of action is not precluded by a prior judgment, the first judgment operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (Frommhagen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, 1299. Original emphasis.)

"Whenever a judgment in one action

is raised as a bar to a later action under the doctrine of res judicata, the key issue is whether the same cause of action is involved in both suits. California law approaches the issue by focusing on the "primary right" at stake: if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (Eichman v. Fotomat Corp. (1983) 147 Cal. App. 3d 1170, 1174.)

Justice Goertzen applied these principles in affirming the dismissal of appellant's second action, his cross-complaint. He stated, "the causes of action for breach of fiduciary duty, intentional misrepresentation and breach of contract in appellant's second amended cross-complaint are barred by the doctrine of res judicata." (Northrop University School of Law v. Stephen A. Hunter

No. B044851, Aug. 20, 1991, p.8.)

The instant action, containing the same causes of action based upon the same facts, is similarily barred by the doctrine of res judicata. (Eichman v. Fotomat, supra, 147 Cal. App. 3d 1170; Code Civ. Proc., 1908 subd. (a)(2).) The trial court did not err in sustaining without leave to amend the demurrer to appellant's 1st amended complaint.

Frivolous Appeal Sanctions

Code of Civil Procedure section 907[2] authorizes a reviewing court to assess "such damages as may be just" when it appears "the appeal was frivolous or taken solely for delay" Rule 26 (a) provides that "where the appeal is frivolous or taken solely for the purpose of delay... the reviewing court may

2 The section provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just."

impose upon offending attorney's or parties such penalties... as the circumstances of the case and the discouragement of like conduct in the future may require." (Cal. Rules of Court, rule 26 (a).)

Our test is the following: "An appeal should be held to be frivolous only when it is prosecuted foran improper motive-- to harass the respondent or delay the effect of an adverse judgment-- or when it indisputably has no merit-- when any reasonable attorney would agree that the appeal is totally and completely without merit." (In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650.

Despite appellant's multiplicity of redundant actions and near interminable delay, we cannot say this appeal "is prosecuted for an improper motive-- to harass the resp- or delay the effect of an adverse judgment... ." (Ibid.) As the trial court noted -- after a protracted colloquy with appellant: "This man is on a mission from God and he-- it's distressing that he's not able to deal

with the reality of the situation...."

Additionally, the record leaves a modicum of doubt whether this appeal "indisputably has no merit." We cannot say that "any reasonable attorney would agree that the appeal is totally and completely without merit." (In re Marriage of Flaherty, supra, 31 Cal. 3d at p. 650.) We therefore decline to grant the petition for sanctions in this instance.

Oral Motion During Oral Argument

At the completion of argument appellant orally moved the court to vacate the judgment in case number WEC089355. Having considered the argument, appellant's motion is herein denied.

DISPOSITION

The judgment of dismissal is affirmed. The respondent's request for an award of sanctions is denied. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED. WOODS (Fred), J.

We Concur: LILLIE, P.J. JOHNSON, J.

Declaration of Stephen A. Hunter

I, Stephen A. Hunter, declare that I recieved a notice from the Court of Appeal 2nd Appellate District, that was dated Feb. 15, 1994, which simply and only stated that my petition for rehearing in the Court of Appeal had been denied. I have looked but have been so far unable to find said notice.

I, Stephen A. Hunter, declare under penalty of perjury that the foregoing is true and correct. Executed on July 26, 1994.

Stephen A. Hunter

APPENDIX B

Second Appellate Disrict, Division Seven,
No. B071292 S038419

IN THE SUPREME COURT OF THE STATE OF CALIF.

IN BANK

STEPHEN A. HUNTER, Appellant

v.

NORTHROP UNIVERSITY SCHOOL OF LAW, Respondent

SUPREME COURT

FILED

April 12, 1994

Robert Waldruff Clerk

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX C